

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JEAN I. COLBORN

Claimant

VS.

SCHOWALTER VILLA

Respondent

AND

**KS ASSOC. OF HOMES FOR
THE AGING INSURANCE GROUP**

Insurance Carrier

Docket No. 1,012,640

ORDER

Claimant requested review of the January 3, 2005 Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on May 25, 2005.

APPEARANCES

James S. Oswalt, of Hutchinson, Kansas, appeared for the claimant. David L. Vogel, of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ concluded that the evidence failed to prove that claimant suffered from permanent impairment to anything other than her left upper extremity. Thus he awarded claimant a 13.35 percent impairment of function to the left upper extremity at the level of the arm, a figure which is the average of the two left upper extremity permanency opinions proffered by the parties' experts. The ALJ concluded that the evidence, "when considered as a whole, fails to establish a permanent impairment of function in the right upper extremity."¹ He reasoned that while she has subjective complaints in her right upper extremity, claimant had a normal nerve conduction study as well as a normal examination following her treatment with Dr. Mark Melhorn, the treating physician. Thus, he declined to

¹ ALJ Award (Jan. 3, 2005) at 5.

award any additional permanency to her right upper extremity, limiting her recovery to a scheduled injury of the left upper extremity only.

The claimant requests review of the ALJ's Award. Specifically, claimant maintains the evidence substantiates her claim of bilateral carpal tunnel complaints as evidenced by the medical testimony of Dr. Pedro Murati. At a minimum, the claimant requests the ALJ's Award be modified to give equal weight to both doctors' ratings, awarding claimant at least 5 percent to the right upper extremity in addition to the 13.35 percent awarded to the left upper extremity.

Respondent argues that Dr. Melhorn is in the best position as claimant's treating physician to render an impairment rating and is clearly more credible than Dr. Murati. Thus, to the extent the Board is inclined to modify the ALJ's Award, respondent contends the ALJ's Award should be modified to reflect the single upper extremity impairment rating of Dr. Melhorn only and claimant be given a 7.7 percent functional impairment rating to the left upper extremity.

The nature and extent of claimant's impairment is the sole issue to be decided by the Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ has succinctly set forth the pertinent facts relevant to this claim and the Board adopts that statement as its own.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.² "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."³

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not

² K.S.A. 44-501(a).

³ K.S.A. 2003 Supp. 44-508(g).

bound by medical evidence presented in the case and has a responsibility of making its own determination.⁴

Here, the ALJ was not persuaded by the evidence that claimant bore a permanent impairment in her right upper extremity as a result of her work activities. The Board agrees. While there is certainly a difference of opinion as between Drs. Murati and Melhorn, the Board is not persuaded by Dr. Murati's opinions as to the permanency of claimant's right upper extremity. Despite his criticisms of Dr. Melhorn's methodology for performing and interpreting nerve conduction studies, he performed no such testing on claimant. The ALJ's Award is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated January 3, 2005, is affirmed in its entirety.

IT IS SO ORDERED.

Dated this _____ day of June, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James S. Oswalt, Attorney for Claimant
David L. Vogel, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁴ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev denied 249 Kan. 778 (1991).